PP

v.

DR MAZLAN MOHD

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
[CRIMINAL APPEAL NO: 41-74-99]
5 MARCH 2001

CRIMINAL LAW: *Control of Drugs and Cosmetics Regulations 1984 - Regulation 7 - Sale and supply of unregistered drug "Noristerat" - Whether mere custody of unregistered drug amounted to an offence under the Regulations - Whether ingredient of "sale" must be established*

EVIDENCE: *Proof of - Drug - Whether failure to produce chemist report fatal to prosecution case - Whether evidence of pharmacist sufficient - Sale of Drugs Act 1952, s. 21(1)*

The respondent herein was a medical practitioner charged for an offence under reg. 7 of the Control of Drugs and Cosmetics Regulations 1984 ('the Regulations') for selling and supplying an unregistered drug known as "Noristerat" ('the drug'). The drug was found in a cupboard in the dispensary room of the respondent's clinic by the raiding party consisting of three pharmacists, *ie*, SP1, SP2 and SP3. The magistrate acquitted and discharged the respondent on the basis that the prosecution failed to prove the ingredient of "sale" in the charge. Hence, this appeal by the Public Prosecutor.

The issues were: (i) whether mere custody of the unregistered drug amounted to an offence under the Regulations; (ii) whether the ingredient of sale must be proved; and (iii) whether the failure by the prosecution to produce the chemist report to ascertain that the drug was Noristerat was fatal to its case.

Held:

[1] Apart from the discovery of the drug in the cupboard, there was no other proof whatsoever to show that the drug was kept or stored for sale within the definition of "sale" under s. 2 of the Sale of Drugs Act 1952 ('the Act'). The prosecution managed to prove that the drug was unregistered and found in the custody of the respondent. Also that the respondent was not the holder of any appropriate licence required and issued under reg. 7(1)(b) of the Regulations. Mere custody of the unregistered drug was not an offence under the Regulations.

[2] The chemist report was not necessary in view of the evidence of the pharmacists, *ie*, SP1, SP2 and SP3. By virtue of PU(B) 328/1978 every pharmacist in the public service is an analyst for the purpose of the Act, and by virtue of s. 21(1) of the Act, an analyst's certificate is *prima facie* evidence of the facts stated therein. Though an analyst's certificate was not produced, SP1, SP2 and SP3 categorically testified in court that the product was Noristerat and that it was a registrable product. That was conclusive evidence to establish the fact that the product was Noristerat.

[3] There was no merit in the appeal. There was not a shred of evidence of sale or supply of the product by the respondent. The magistrate rightfully acquitted the respondent at the end of the prosecution case.

[Appeal dismissed.]

Legislation referred to:
Control of Drugs and Cosmetics Regulations 1984, reg. 7(1)(a), (b), (3)
Sale of Drugs Act 1952, ss. 2, 21(1)

For the Public Prosecutor - Wan Mohd Norisham Wan Yaakob DPP
For the respondent - Amir Mahmood Mohd Razali; M/s Radzuan Ibrahim & Co

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

Introduction

The respondent, a medical practitioner, was charged for the following offence:

> Bahawa kamu pada 24hb. Mei, 1998 jam lebih kurang 3.30 petang di Klinik Mazlan, Pekan Bukit Payong, Jalan Rawai dalam daerah Marang di dalam Negeri Terengganu telah didapati menjual/membekal keluaran tidak berdaftar iaitu 57 kotak Noristerat dengan nama pengilang Scharing AG Pharmaceutical Division, Berlin Federal Republic of Germany iaitu satu perbuatan yang bertentangan dengan Peraturan 7(1) Peraturan-Peraturan Kawalan Dadah dan Kosmetik 1984 di bawah Akta Jualan Dadah 1952 dan dengan ini kamu telah melakukan kesalahan dibawah Peraturan 30(1) Peraturan-Peraturan Kawalan Dadah dan Kosmetik 1984 dan boleh dihukum dibawah Peraturan 30(2) Peraturan yang sama.

At the close of the prosecution's case, the learned magistrate found that the prosecution had failed to prove a *prima facie* case against the respondent and as such he ordered the respondent be acquitted and discharged without calling for his defence. Hence this appeal by the learned public prosecutor against the order of the learned magistrate.

The Appeal

Learned Deputy Public Prosecutor, Encik Wan Mohd Norisham bin Wan Yaakob, submitted that the learned magistrate had misconstrued the definition of sale under s. 2 of the Sale of Drugs Act 1952 (the Act) when he held that the prosecution had failed to prove the ingredient of "sale" in the charge.

Learned counsel for the respondent, Encik Amir Mahmood bin Mohd Razali, on the other hand, supported the order of the learned magistrate on the ground that there was no evidence of sale or supply against the respondent.

After hearing them, I, on 20 February 2001, dismissed the appeal and affirmed the order of acquittal made by the learned magistrate. I now give my reasons.

Findings Of The Court

(i) Whether There Was Any Evidence Of Sale Or Supply Of Noristerat

On the facts, I, with respect, agree with learned counsel for the respondent that there was no evidence of sale or supply of the Noristerat in this case.

Section 2 of the Act defines "sale" or "sell" includes, barter and exchange and also includes, offering or attempting to sell or causing or allowing to be sold or exposing for sale or receiving or sending or delivering for sale or having in possession for sale or having in possession any drug knowing that the same is likely to be sold or offerred or exposed for sale, and refers only to sale for human consumption or use.

Whereas reg. 7 of the Control of Drugs and Cosmetics Regulations 1984 (the Regulations) states:

> (1) Except as otherwise provided in these Regulations, no person shall manufacture, sell, supply or import any product unless:
>
> (a) the product is a registered product; and
>
> (b) the person holds the appropriate licence required and issued under these Regulations.
>
> (2) The requirement of sub-regulations (1)(b) does not apply to the sale or supply of any product by a retailer.

In this case, the offending articles were 57 boxes of Noristerat, a medical product used as an injectable contraceptive. The raiding party consisting of three pharmacists found the product in a cupboard in the dispensary room of the respondent's clinic. The respondent and his two employees were present. By the label, the product was made in Germany and was imported by Bangkok Ltd. Northaburi. It was established that the product was not registered and that the respondent was not the holder of any licence under the regulations.

Apart from the discovery of the product in the cupboard, there was no other proof whatsoever to show that the product was kept or stored for sale within the definition of "sale" under s. 2 of the Act. Neither was there was any evidence of supply of the product by the respondent. The two employees who were present during the raid were not even called to give evidence for the prosecution. Further, no documentary evidence was ever produced to show that the respondent had any link with the product. It is common knowledge that a medical clinic, unlike a grocery shop, is not a place where any person can walk in and buy medical products as he pleases. He can only be supplied with medical products upon prescription after being examined by the doctor. What the prosecution had managed to prove thus far in the present case, was that the product was not registered and found in the custody of the respondent (reg. 7(1)(a)) and that the respondent was not the holder of any appropriate licence required and issued under the regulations (reg. 7(1)(b)). But a mere custody of the product is not an offence under the regulations. Regulation 7(3) provides that the provision of sub-regs (1) do not apply to any person who has any product meant solely for his use in a quantity not exceeding that which may be reasonably required for one month's use by one person. In this case, there was no evidence on record that Noristerat was only for women's use and that the amount of the medical product ie, 57 boxes of Noristerat, was not reasonably required for the respondent's use for one month. SP3, a pharmacist, under cross-examination at p. 28 of record correctly testified:

DC – Adakah pengguna Noristerat dibenarkan?
– Ya
DC – Jika saya beli yang tidak berdaftar, adakah salah?
– Membeli tak salah tapi menjual salah.
DC – Bagaimana dengan memiliki?
– Bawah Peraturan 7 tidak.

That is, however, not the end of the matter.

(ii) Is A Chemist Report Necessary?

The learned magistrate had in his grounds of decision ruled that the failure by the prosecution to produce a chemist report to certify that the product was in fact Noristerat was fatal to the prosecution. In my judgment, such failure was of no consequence. In the present case, a chemist report was not necessary in view of the evidence of SP1, SP2 and SP3, who were analysts by virtue of their appointment as pharmacists in the public service. By gazette P.U.(B) 328 dated 16 May 1978, the Yang di-Pertuan Agong appointed every pharmacist in the public service to be an analyst for the purpose of the Act. And by the provision of s. 21(1) of the Act, an analyst's certificate is

receivable as *prima facie* evidence of the facts stated therein. Though an analyst's certificate was not produced in this case, all the three witnesses (SP1, SP2 and SP3) were called and gave oral evidence in court and categorically testified that the product was Noristerat and that it was a registrable product. This, in my view, was conclusive to establish that the product was in fact Noristerat.

Conclusion

In the circumstances, I ruled that there was no merit in the appeal. There was not a shred of evidence of sale or supply of the Noristerat by the respondent in the instant case. The learned magistrate was therefore absolutely right in acquitting the respondent at the end of the prosecution's case. Thus, the appeal was dismissed.